environmental
DEFENSE CENTER

September 19, 2016

Planning Commission
San Luis Obispo County
Department of Planning and Building
976 Los Osos Street, Room 200
San Luis Obispo, CA 93408-2040

Re: Phillips 66 Rail Spur Extension Project – DENY

Dear Honorable Commissioners,

The following comments are submitted by the Environmental Defense Center ("EDC") on behalf of Sierra Club, Stand, Center for Biological Diversity, San Luis Obispo Chapter of Surfrider Foundation and EDC, urging the San Luis Obispo County Planning Commission ("Commission") to deny the application for the Phillips 66 Rail Spur Extension Project ("Project"). This letter supplements our earlier comment letters and focuses on the fact that the Project cannot be approved because it violates the Coastal Act and San Luis Obispo County's Local Coastal Program ("LCP"). In addition, the Project must be denied because of the numerous dangerous and environmentally harmful Class I impacts that cannot be mitigated. The proposed Statement of Overriding Considerations cannot be adopted because the alleged benefits are illusory and do not overcome the significant and unavoidable impacts to public health and safety, the environment, water quality, and agriculture.

We therefore support the staff's recommendation that you act on September 22nd to **DENY** the proposed Project. The proposal to import crude oil to the Phillips 66 refinery is contrary to longstanding County plans for the region. Nor is the Project necessary; as noted in the Final Environmental Impact Report ("FEIR"), the refinery can continue to handle crude oil from local and regional sources without the proposed Project. In fact, approving the Project may actually displace jobs and hurt the local economy.

This letter will address the following issues that are presented in the staff's September 22, 2016 agenda packet:

- As noted in the February 4, 2016, staff report and confirmed by the Coastal Commission staff, the Project will disturb environmentally sensitive habitat area

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("ESHA") in violation of the LCP and Coastal Act. The presence of ESHA was well known at the time the Project application was filed as complete;

- The Project cannot be approved because it violates additional policies and requirements of the County's LCP; and

- The Statement of Overriding Considerations is illusory, does not outweigh the Project's many adverse impacts, and fails to comply with the California Environmental Quality Act ("CEQA").

Other counsel will address additional grounds supporting denial of the proposed Project.

I. The Project Would Unlawfully Disturb More Than Twenty Acres of Protected ESHA.

The September 22, 2016, staff report states that "the area of project disturbance where sensitive habitat is located and would be removed cannot be classified as Unmapped ESHA because per the Coastal Zone Land Use Ordinance (CZLUO), the determination of presence of Unmapped ESHA was not made at or before the time of acceptance of the project's land use application." (Staff report at 3.) This statement contradicts the findings set forth in the February 4, 2016, staff report and ignores the fact that the County's LCP, including the CZLUO, must be interpreted and enforced consistent with the Coastal Act.

Under the Coastal Act, ESHA is broadly identified as "any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments." Pub. Res. Code Section 30107.5. These areas are "protected against any significant disruption . . . and only uses dependent on those resources shall be allowed within those areas." Pub. Res. Code Section 30240(a); see also *Sierra Club v. California Coastal Com.*, 12 Cal. App. 4th 602, 611 (1993). Additionally, developments adjacent to ESHA are subject to heightened regulation. Pub. Res. Code Section 30240(b).

ESHA must be protected where it exists; it cannot be recreated in another location to allow development. Instead, the Coastal Act's "obvious goal" is to protect ESHA in situ, and the terms of the statute "do not provide that protection by treating those values as intangibles which can be moved from place to place to suit the needs of the development." *Bolsa Chica*, 71 Cal. App. 4th at 507.

Moreover, the Coastal Act does not allow for the restrictions to be ignored or altered based on the status of the ESHA. Threatened or deteriorating ESHA receives no less protection due to its degraded state. *Id.* at 507–08; *Kirkorowicz v. California Coastal Com.*, 83 Cal. App. 4th 980, 994–95 (2000).

The County staff report dated February 4, 2016, Exhibit C ("Findings for Denial"), confirmed that "the project site meets the definition of Unmapped ESHA in the County's LCP

(CZLUO Section 23.11). The area contains sensitive plant and animal species needing protection, including Rank 1B status plants, sensitive communities recognized by the CDFW, burrowing owls, and coast horn lizard. In addition, the Rail Spur Project area meets the definition of ESHA as defined in the guidelines set forth by the California Coastal Commission for defining ESHA (CCC 2013). As discussed further below in impact BIO.5, the Rail Spur Project would permanently impact a total of about 20 acres of ESHA." (Findings, Exhibit C, page 1; see further discussion at pp. 1-3.)

In our letter to the Commission dated May 15, 2016, we provided extensive legal and evidentiary background demonstrating that the Project would disturb protected ESHA. We noted that the Coastal Commission's certification of the County's LCP Amendment in 2008 was predicated on the fact that the amended LCP included "unmapped ESHA" in the CZLUO 23.11.030 definition of ESHA. Specifically, the CZLUO was amended to require that the existence of Unmapped ESHA must be determined by the County at or before the time of application acceptance, and must be based on the best available information.

A. ESHA was Identified On-Site Before the Phillips' Application was Accepted as Complete.

As explained by County planning staff and evidenced by County documents, ***ESHA was identified on-site before Phillips' application was filed as complete.*** First, Phillips' own consultant, Arcadis, prepared a *Wildlife and Habitat Assessment* report dated June 17, 2013, and submitted this report to the County prior to the application being accepted by the County on July 12, 2013. The report states, "...the coast horned lizard (*Phrynosoma coronatum*) and American badger (*Taxidea taxus*), are more likely encountered on the Site and therefore are discussed in more detail below."[1] The report then describes the site as providing "foraging opportunities" for a number of additional special-status species, including northern harrier, red-tailed hawk, red-shouldered hawk, Cooper's hawk, great horned owl, barn owl, western screech owl, white-tailed kite, and loggerhead shrike.[2] White-tailed kites are a Fully Protected Species under the California Fish and Game Code. "The open space on the SMR property is considered an important foraging location for both sedentary and migratory raptor species in the area."[3] Raptors are protected under the CDFW Code (Section 3503.5) and the Migratory Bird Treaty Act.[4]

Arcadis' report also lists "several sensitive wildlife species" which "have been reported from the Oceano and or neighboring quadrangles" and which have been "observed on the Site" by Arcadis' County-approved biologists, including the Western burrowing owl, Loggerhead shrike, Northern harrier, Ferruginous hawk and Cooper's hawk.[5] The Arcadis report also notes the presence of Bell's Sage Sparrow, a California Species of Concern.[6] The Arcadis report assumes the presence of coast horned lizard and legless lizard, which are special-status species.[7]

[1] Arcadis, *Wildlife and Habitat Assessment* (June 17, 2013), p. 6.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.* at pp. 8 - 9.
[7] *Id.* at p. 6.

In addition, Arcadis submitted a second report, containing a *Botanical Assessment*, dated June 13, 2013, before the application was accepted as complete. This report supported designation of the site as an Unmapped ESHA based on the observed presence of the Blochman's leafy daisy (CNMPS List 1B.2) "within the Proposed Disturbance Area"[8] onsite. The Botanical Assessment refers to this species as a "sensitive plant species."[9]

Accordingly, the applicants' own reports, which were prepared and submitted to the County before the application was accepted as complete, demonstrated the presence of Unmapped ESHA on the Project site as defined in CZLUO Sections 23.11.030 (see Definition of Environmentally Sensitive Habitat Area (Unmapped ESHA)).

Finally, the County's own Initial Study, which was prepared before the application was filed as complete, identified many sensitive habitats that qualified as ESHA.[10] According to the Initial Study, the Project would result in potentially significant impacts to Biological Resources due to the fact that the Project would result in a loss of unique or special status species or their habitats; reduce the extent, diversity or quality of native or other important vegetation; interfere with the movement of resident or migratory fish or wildlife species, or factors, which could hinder the normal activities of wildlife; and conflict with any regional plans or policies to protect sensitive species, or regulations of the California Department of Fish & Wildlife or U.S. Fish & Wildlife Service.[11]

The Initial Study listed several sensitive plant and animal species and their habitats. Information was obtained from the Natural Diversity Database as well as surveys at the Project site.[12] Included in this analysis was a list of sensitive species "observed within the proposed area of disturbance for the rail spur extension."[13] The Study concluded that:

> Due to the area's special environmental qualities, areas west of the railroad have been designated as within the County's SRA combining designation and are also considered ESHA due to the potential value of the Terrestrial Habitat (TH) at that location. Additional areas within the project site that contain habitat and/or qualities consistent with those found in an SRA, TH, or ESHA designation would also be considered Environmentally Sensitive Habitat Area. Special requirements will apply to these areas relating to the protection of sensitive biological resources, which are intended to preserve and protect rare and endangered plants and wildlife and the habitat in which they reside.[14]

The Initial Study further found that the Project would:

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[8] Arcadis, *Botanical Assessment* (June 13, 2013), at p. 9.
[9] *Id.* at p. 1.
[10] *Initial Study Summary – Environmental Checklist*, July 8, 2013.
[11] Initial Study at pp. 1, 9.
[12] *Id.* at p. 10.
[13] *Id.*
[14] *Id.* at p. 11.

> result in the removal of a large amount of on-site vegetation, including areas that may qualify as ESHA. Appropriate habitat characteristics for certain sensitive wildlife and plant species exist at the project site and are likely to support candidate or listed special status species. Construction and development activities associated with the rail extension have the potential to disrupt these sensitive species and/or damage or destroy suitable habitat areas…
> [ ]
> The project site is known to support several state- and federally-listed special status species. It also includes areas that constitute protected SRAs and/or ESHA that would be disturbed during construction and operation of the project.[15]

Therefore, it is uncontroverted that ESHA was identified on-site before the Phillips application was accepted as complete.

B. The Best Available Information at the Time the Application was Accepted as Complete Confirmed that ESHA was Available On-Site.

In addition to the Initial Study and the Arcadis reports for the Project, which were all prepared prior to application acceptance, the "best available information" confirmed the existence of ESHA at the Project site. As noted in our prior comment letters, this information included the *Manual of California Vegetation*, the California Native Plant Society's *Inventory of Rare and Endangered Plants*, the California Department, the Nature Conservancy's report on the "*Origin, maintenance, and land use of aeolian sand dunes of the Santa Maria Basin, California.*"

Therefore, prior to the acceptance of the application as complete, the County identified not only the presence of ESHA, but also the potential for adverse impacts to such sensitive habitat areas. Combined with the information presented by the applicant and the other information available at the time of the application, the Initial Study clearly identified the presence of ESHA at the Project site. The Coastal Act protects such areas from disturbance.

II. The Project Cannot be Approved Because it Violates Additional Policies and Requirements of the County's LCP.

The proposed Findings do not address consistency with the County's LCP. Exhibit A, Findings for Approval, provides Findings in support of approval of a Conditional Use Permit but not a Coastal Development Permit ("CDP"). A CDP cannot be approved unless the proposed project is consistent with the local agency's certified LCP. Cal. Pub. Res. Code §§ 30600.5(c); 30604(b).

As noted in the County's February 4, 2016, staff report, the Project is *inconsistent* with several goals and policies of the County's LCP, including the Local Coastal Program Policy Document, Coastal Zone Framework for Planning, Coastal Zone Land Use Ordinance, and South County Area Plan. (See Staff Report to the Planning Commission at page 5 and Exhibit A; see also EDC letter dated February 2, 2016.) Additionally, the Project is inconsistent with the

[15] *Id.*

County's air quality programs and regulations, in contravention to Coastal Plan Chapter 13, Policy 1. (*Id*., Exhibit A at 7 – 8; this Policy provides that "[t]he County will provide adequate administration and enforcement of air quality programs and regulations to be consistent with the County's Air Pollution Control District and the State Air Resources Control Board.)

In sum, the Project cannot be approved because it is inconsistent with the County's LCP.

III. The Proposed Statement of Overriding Considerations Does Not Outweigh the Devastating Impacts of the Project and Includes Illusory Items that Violate CEQA.

Additionally, the Project cannot be approved because it would result in numerous impacts to the community that cannot be avoided, and that are not outweighed by any benefits to the County. As noted in the Final EIR and September 22, 2016, staff report, the Project would result in significant and unavoidable impacts relating to Agricultural Resources, Air Quality and Greenhouse Gases, Biological Resources, Cultural Resources, Hazards and Hazardous Materials, Public Services and Utilities, and Water Resources. (Staff report, Exhibit C at page 10.) To offset such impacts, the proposed Statement of Overriding Considerations is based solely on alleged economic benefits related to construction, operations, including maintenance of ongoing operations. This Statement lacks supporting evidence and overstates any potential benefits of the Project.

A. There is No Evidence that the Project will Provide Additional Economic Benefits to the Local and Regional Economy.

The County's findings must be supported by substantial evidence. CEQA Guidelines § 15091(b). In this case, there is no evidence to support the proposed findings. First, there is no evidence demonstrating a benefit *to the County* from the capital investment necessary to construct the Rail Spur. The alleged capital investment is not tied at all to the local and regional economy.

Second, the construction jobs will be temporary and will thus not offset the long-term, permanent impacts of the Project.

Third, the number of permanent jobs (eight to twelve) is miniscule in comparison to the workforce in the County.

Fourth, there is no evidence of any additional tax revenue, especially since the Project is simply intended to allow the refinery access to another source of crude and may in fact displace local crude.[16] (Final EIR at 2-36: "depending upon the volume of crude oil received by rail,

[16] Although the proposed Findings do not include any specific predictions for tax revenue, Phillips predicts an increase in property tax assessment of $400,000 – 600,000, but does not provide any evidence to support this estimate. (See Phillips letter to the County dated August 15, 2016.) In any event, this amount represents approximately 1% of the County's total expected tax revenue of $43,000,000 for 2015-2016. This insignificant contribution to the County's property

some of the oil delivered via pipeline or via truck to the Santa Maria Pump Station could be displaced. Any displaced crude oil would likely be sold to other refineries in the Los Angeles or Bay areas.") Although production from offshore Santa Barbara County has been declining, the Final EIR notes that "[t]here are a number of onshore oil development projects in northern Santa Barbara County that are being proposed that if approved could replace some of this lost production." (*Id*., see also Final EIR at 5-3: under the No Project Alternative, "new local sources of crude oil could be developed in the future that would offset any decline.") As Phillips' own representative testified at an earlier hearing, the purpose of the Project is to expand the "options" available to the company.

B. There is No Evidence that the Project will Enhance the Economic Viability of the Refinery.

Similarly, there is no evidence that the Project will "enhance the economic viability of the refinery." Most importantly, there is no evidence that the refinery will close if the Project is denied. On the contrary, the Final EIR states that without the Project, crude oil deliveries would continue, and that even if current supplies decline, "new local sources of crude oil could be developed in the future" to offset such decline. (Final EIR at 5-3; see also Final EIR at 5-39: "With the No Project Alternative…the SMR would continue to receive crude oil from the existing pipeline network and via truck from the SMPS.")

In sum, the small number of jobs, speculative revenue and lack of evidence that existing operations would be negatively impacted demonstrates the lack of benefits to outweigh the Class I significant impacts to air quality, public health and safety, cultural resources, biological resources, agriculture and water resources.

Conclusion

Thank you for your consideration of these comments.

Sincerely,

Linda Krop,
Chief Counsel

cc: Sierra Club
Stand
Center for Biological Diversity
San Luis Obispo Chapter of Surfrider Foundation
California Coastal Commission

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tax revenue does not outweigh the substantial threats to public health, safety and welfare. Phillips also references unknown indirect tax increases (e.g., sales taxes) without any empirical evidence.

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SERVICE DATE – LATE RELEASE SEPTEMBER 20, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36036

VALERO REFINING COMPANY—PETITION FOR DECLARATORY ORDER

Digest:[1] Valero Refining Company (Valero), a noncarrier, asks the Board to issue a declaratory order finding that decisions by the City of Benicia Planning Commission denying certification of an environmental impact report and denying Valero's conditional use permit for a crude oil off-loading facility are preempted by federal law. The Board denies the petition for declaratory order, but provides guidance on the issue of preemption.

Decided: September 20, 2016

By petition filed on May 31, 2016, Valero Refining Company (Valero) seeks a declaratory order finding that the City of Benicia's Planning Commission (Planning Commission) decisions denying certification of an environmental impact report (EIR) and denying Valero's conditional use permit for a crude oil off-loading facility are preempted by 49 U.S.C. § 10501(b). (Valero Pet. 1.) Several parties filed replies both in support[2] of and in opposition[3] to Valero's petition.[4]

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[1] The digest constitutes no part of the decision of the Board, but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] The following parties filed replies in support of Valero's petition: Union Pacific Railroad Company; CSX Transportation, Inc. (CSXT); Canadian National Railway Company (CN); Phillips 66 Company (Phillips 66); Tesoro-Savage Petroleum Terminal, LLC, D/B/A Vancouver Energy (Vancouver Energy); Association of American Railroads (AAR); and QEP Energy.

[3] The following parties filed replies in opposition to Valero's petition: City of Benicia (Benicia); Association of Irritated Residents, Climate Solutions, Columbia Riverkeeper, Evergreen Islands, Friends of the Columbia Gorge, Friends of the Earth, Resources for Sustainable Communities, Friends of the San Juans, Spokane Riverkeeper, and Washington Environmental Council (collectively, Earthjustice); People of the State of California (California); Benicians; Safe Fuel and Energy Resources California (SAFER California); the Cities of Davis, Berkeley, and Oakland, the County of Yolo, and the Sacramento Area Council of Governments (collectively, California Local Government Agencies); and League of California Cities (League).

[4] James MacDonald also submitted two filings that appear to challenge the construction

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For the reasons discussed below, Valero's petition for a declaratory order will be denied, but the Board will provide guidance concerning other potential preemption issues.

BACKGROUND

Valero, a noncarrier, owns and operates an oil refinery in Benicia, Cal. (Valero Pet. 1.) According to Valero, 10% of gasoline consumed in California is produced in the Benicia refinery. (Id. at 8.) Valero currently receives crude oil at the refinery by marine vessel from Alaska and foreign sources, and by pipeline from producers in California, but does not receive any crude oil by rail.[5] (Id.) Valero seeks to install a crude off-loading facility because it has determined that it needs access to North American crude oil feedstock—which is economically and competitively accessible only by rail—to remain viable and competitive in the long term. (Id. at 8-9.) Valero states that the proposed off-loading facility would have the capacity to receive 50-car unit trains of crude oil twice per day (approximately 70,000 barrels per day), but that the operating capacity of the refinery would not change. (Id. at 8.)

In December 2012, Valero submitted its land use permit application for construction and operation of the off-loading facility at the Benicia refinery to the Planning Commission. The application stated that the facility would be served by Union Pacific Railroad Company (UP). (Id. at 9.) According to Valero, over the following three years, Benicia city staff and environmental consultants prepared an EIR[6] evaluating the environmental impact of the construction and operation of the off-loading facility. (Id. at 2.) Valero states that, in addition to addressing potential environmental impacts at the proposed facility location, the EIR disclosed potential environmental impacts from proposed UP rail operations between the Benicia refinery and California's borders with Oregon and Nevada. (Id. at 9.) The EIR did not include proposed mitigation for the potential environmental impacts of UP rail operations because Benicia city staff determined that such measures would be preempted by 49 U.S.C. § 10501(b). (Id. at 9-10.)

On February 11, 2016, the Planning Commission denied certification of the EIR and denied Valero's land use permit application. The Planning Commission enumerated 14 reasons for denying certification of the EIR, some of which were based on the potential effects of increased rail traffic outside of the off-loading facility location and others that addressed potential effects of the construction and operation of the off-loading facility itself. (See Valero Pet., Ex. 4 at 4-5.) Valero appealed the Planning Commission's decision to the Benicia City

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of Valero's off-loading facility under state and federal environmental law and do not address whether the Planning Commission's denials are preempted by federal law. (See MacDonald Reply, July 6, 2015; MacDonald Reply, July 8, 2016.)

[5] Valero states that the refinery does receive isobutane by rail and ships caustic, commercial coke, liquefied propane gas, and petroleum coke by rail. (Valero Pet. 8.)

[6] The EIR refers collectively to the draft EIR, the revised draft EIR, and the final EIR, all prepared by the City of Benicia, apparently to satisfy its obligations under the California Environmental Quality Act (CEQA). (Valero Pet. 9.)

Council. (Id. at 12.) The City Council voted on April 19, 2016, to defer a decision until September 20, 2016, to allow Valero to raise the issue of preemption with the Board.

Valero challenges the Planning Commission's denial of certification of the EIR and of the land use permit as impermissibly based on findings of environmental impacts related to UP's increased rail traffic. (Id. at 12.) Valero asserts that Benicia is engaged in impermissible indirect rail regulation, stating that "[t]he Planning Commission Resolution is so full of managing, governing and regulating rail transportation that it is not possible to determine with any degree of certainty what action the Planning Commission would have taken on the EIR or the permit if it had acted within the bounds of its authority." (Valero Pet. 16.) Valero maintains that the Planning Commission's refusal to certify the EIR and denial of the land use permit are federally preempted under § 10501(b) because they prevent rail transportation of crude oil to the refinery, deny Valero its right to receive rail service, and prevent UP from providing such rail service. Id.

UP, Vancouver Energy, AAR, Phillips 66, CN, CSXT, and QEP Energy support Valero's petition and ask the Board to provide guidance on the scope of permissible indirect rail regulation in these circumstances. (See, e.g., UP Reply 1.) Benicia also requests that the Board provide guidance on its ability to impose conditions on Valero that are designed to avoid or mitigate impacts related to rail operations, although it opposes the petition. (Benicia Reply 1.)

Benicia argues that, in denying certification of the EIR and approval of Valero's land use permit, it was exercising its local land use authority pursuant to CEQA. (Benicia Reply 2.) According to Benicia, its actions are not federally preempted, because Valero is a noncarrier and is not acting as an agent for a rail carrier in constructing and operating the off-loading facility. (Id. at 1-2, 7-8.) Earthjustice, California Benicians, SAFER California, California Local Government Agencies, and the League also ask the Board to find that the Planning Commission's decisions are not preempted.

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction. See, e.g., Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675, 675 (1989). Where appropriate, the Board may decline to institute a proceeding and instead provide guidance on the preemption issue presented, as the Board will do here. See, e.g., 14500 Ltd.—Pet. for Declaratory Order, FD 35788, slip op. at 2 (STB served June 5, 2014).

The Interstate Commerce Act (Act) is "among the most pervasive and comprehensive of federal regulatory schemes." Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981). The federal preemption provision contained in § 10501(b) bars the application of most state and local laws to railroad operations that are subject to the Board's jurisdiction.[7]

[7] State or local permitting or preclearance requirements, including building permits, zoning ordinances, and environmental and land use permitting requirements, are categorically (continued . . .)

Because the Board has jurisdiction over "transportation by rail carrier," 49 U.S.C. § 10501(a), to be subject to the Board's jurisdiction and qualify for federal preemption under 49 U.S.C. § 10501(b), the activities at issue must be "transportation" and must be performed by, or under the auspices of, a "rail carrier." The statute defines "transportation" expansively to encompass any property, facility, structure or equipment of any kind related to the movement of passengers or property, or both, by rail, and services related to that movement, including receipt, delivery, transfer in transit, storage, and handling of property. 49 U.S.C. § 10102(9). Moreover, "railroad" is defined broadly to include a switch, spur, track, terminal, terminal facility, freight depot, yard, and ground, used or necessary for transportation. 49 U.S.C. § 10102(6). Whether a particular activity is considered part of transportation by rail carrier under § 10501 is a case-by-case, fact-specific determination. City of Alexandria, Va.—Pet. for Declaratory Order, FD 35157, slip op. at 2 (STB served Feb. 17, 2009); see also, N.Y. & Atl. Ry. v. STB, 635 F.3d 66, 73-74 (2nd Cir. 2011).

The Board finds here that there is no preemption because the Planning Commission's decision does not attempt to regulate transportation by a "rail carrier." The Board's jurisdiction extends to rail-related activities that take place at transloading (or, as here, off-loading) facilities if the activities are performed by a rail carrier, the rail carrier holds out its own service through a third party that acts as the rail carrier's agent, or the rail carrier exerts control over the third party's operations.[8] The record presented to the Board in this case, however, does not

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preempted as to any facilities that are part of transportation by rail carrier. See Green Mountain R.R. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005). Other state actions may be preempted as applied—that is, only if they would have the effect of unreasonably burdening or interfering with rail transportation. See N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007); Joint Pet. for Declaratory Order—Bos. & Me. Corp. & Town of Ayer, 5 S.T.B. 500, 507-08 (2001), recons. denied (STB served Oct. 5, 2001). Even where § 10501(b) preemption applies, there are limits to its scope. Overlapping federal statutes are to be harmonized, with each statute given effect to the extent possible. Moreover, states retain police powers to protect the public health and safety on railroad property so long as state and local regulation do not unreasonably interfere with interstate commerce. Ass'n of Am. R.R.s v. S. Coast Air Quality Mgmt. Dist., 622 F.3d 1095, 1097-98 (9th Cir. 2010); Green Mountain, 404 F.3d at 643.

[8] Compare Green Mountain, 404 F.3d at 642 (transloading and temporary storage of bulk salt, cement, and non-bulk foods by a rail carrier qualified for preemption); Lone Star Steel Co. v. McGee, 380 F.2d 640, 647 (5th Cir. 1967), City of Alexandria (ethanol transload facility operated under auspices of a rail carrier qualified for preemption), and Ass'n of P&C Dock Longshoremen v. Pittsburgh & Conneaut Dock Co., 8 I.C.C.2d 280, 290-95 (1992) (an agent undertaking the obligations of a common carrier (i.e., performing services as part of the total rail service contracted for by a member of the public) also holds itself out to the public as being a common carrier by rail, and is therefore subject to federal regulation), with Town of Milford, Mass.—Pet. for Declaratory Order, FD 34444, slip op. at 3-4 (STB served Aug. 12, 2004) (Board lacked jurisdiction over noncarrier operating a rail yard where it transloaded steel pursuant to an agreement with the rail carrier, but the transloading services were not being offered as part of common carrier services offered to the public); High Tech Trans, LLC—Pet. for Declaratory
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demonstrate that Valero is a rail carrier or that it is performing transportation-related activities on behalf of UP or any other rail carrier at its off-loading facility.

Relying on Boston & Maine Corp.—Petition for Declaratory Order (Winchester), FD 35749 (STB served July 19, 2013), Valero argues that the Planning Commission's actions have deprived it of the right to receive common carrier rail service and are, thus, federally preempted under § 10501(b). Winchester, however, involved a local regulation that would have stopped a rail carrier from operating its existing common carrier rail service over the line in question. The Board determined that § 10501(b) preempted this regulation because it prevented the rail carrier from conducting its operations in interstate commerce. Unlike the facts in Winchester, Valero has not identified an attempt by the Planning Commission to regulate *UP's* operations. Here, Valero's challenge involves the Planning Commission's decisions regarding *Valero's* off-loading facility, and Valero is not a rail carrier, nor is it acting under the auspices of a rail carrier.

Valero also cites Norfolk Southern Railway v. City of Alexandria (Alexandria), 608 F.3d 150 (4th Cir. 2010), for the premise that a locality cannot indirectly regulate rail transportation by regulating noncarriers. Alexandria is inapposite, however, as it involved an ethanol transload facility constructed and owned by Norfolk Southern Railway Company and operated under its auspices. As noted above, Valero makes no allegation that it is a rail carrier or that it would be performing offloading under the auspices of a rail carrier at the facility at issue here.

Instead, the facts here are more analogous to the Board's decision in SEA-3, Inc.—Petition for Declaratory Order (SEA-3), FD 35853 (STB served Mar. 17, 2015). In that case, SEA-3—a noncarrier seeking to expand an offload facility served by a single rail carrier—claimed that the expansion of its facility was necessary for it to receive cost-effective propane. SEA-3, slip op. at 2. Portsmouth, a nearby city, sought to stop construction of the expanded facility, and SEA-3 claimed that Portsmouth opposed the project because it wanted to block the rail traffic that would travel through the city. Id. SEA-3 filed a petition with the Board arguing that any attempt by a locality or state to direct rail traffic or impose preclearance requirements on an offload facility is federally preempted. Id. The Board in SEA-3 found that the local government's participation in zoning litigation over the expansion of SEA-3's facility was not preempted and did not reflect undue interference with transportation by rail carriers. Id., slip op. at 6-7. The Board stated that if the locality "were to take actions as part of a proposed safety/hazard study, or otherwise, that interfere unduly with [the railroad's] common carrier operations, those actions would be preempted under § 10501(b)." Id. at 7 (citing Winchester).

(. . . continued)
Order—Newark, N.J., FD 34192 (Sub-No. 1), slip op. at 7 (STB served Aug. 14, 2003) (no STB jurisdiction over truck-to-truck transloading prior to commodities being delivered to rail); and Town of Babylon & Pinelawn Cemetery—Pet. for Declaratory Order, FD 35057, slip op. at 5 (STB served Feb. 1, 2008) (Board lacked jurisdiction over activities of a noncarrier transloader offering its own services directly to customers).

Although Valero argues that the facts in this case are distinguishable from SEA-3, its arguments are not persuasive. As discussed above, Valero has not demonstrated that the Planning Commission's decisions unreasonably interfere with UP's common carrier operations. Accordingly, this situation, like the situation in SEA-3, does not reflect undue interference with "transportation by rail carriers" within the Board's jurisdiction under § 10501(b).

Benicia also seeks Board guidance on: (1) whether § 10501(b) preempts Benicia from imposing mitigation measures or conditions of approval of the use permit that would directly regulate the activities of UP; and (2) whether Benicia could impose mitigation measures or conditions of approval on Valero to alleviate indirect impacts related to the project that are caused by the activities of UP in delivering crude oil by rail. (Benicia Reply 16.) As an initial matter, any attempt to regulate UP's rail operations on its lines would be categorically preempted. CSX Transp. Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 5 (STB served May 3, 2005). Otherwise, state and local regulation is permissible where it does not unreasonably interfere with rail transportation. Ass'n of Am. R.R.s, 622 F.3d at 1097; Alexandria, 608 F.3d at 158, 160. Localities retain their reserved police powers to protect the public health and safety so long as their actions do not discriminate against rail carriers or unreasonably burden interstate commerce. See Ass'n of Am. R.R.s, 622 F.3d at 1097; Green Mountain, 404 F.3d at 643. For example, local electrical, plumbing, and fire codes are generally applicable. Green Mountain, 643 F.3d at 643. State and local action, however, must not have the effect of foreclosing or unduly restricting the rail carrier's ability to conduct its operations or otherwise unreasonably burden interstate commerce. See CSX Transp. Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 5 (STB served May 3, 2005); see also Ass'n of Am. R.R.s, 622 F.3d at 1079-98. If the offloading facility were eventually to be constructed but the EIR or the land use permit, or both, included mitigation conditions unreasonably interfering with UP's future operations to the facility, any attempt to enforce such mitigation measures would be preempted by § 10501(b).

It is ordered:

1. Valero's petition for declaratory order is denied, and this proceeding is discontinued.

2. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Commissioner Begeman concurred with a separate expression.

Commissioner Begeman, concurring:

I concur only in the Board's decision that the City of Benicia's Planning Commission certification and permit denials are not preempted by 49 U.S.C. § 10501(b).